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VIA ELECTRONIC FILING

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Generic Docket to Study and Review Pre-filed Rebuttal and Surrebuttal Testimony in Hearings and Related Matters
Docket No. 2021-291-A

Dear Ms. Boyd:

On November 3, 2021, the Public Service Commission of South Carolina ("Commission") issued Order No. 2021-736 in which the Commission requested all interested stakeholders to "provide comment and thoughts on procedure, substance requirements, and timelines for pre-filed testimony and exhibits, including the need for pre-filed written rebuttal and/or surrebuttal testimony versus reserving rebuttal and/or surrebuttal testimony to be provided live during the hearing." The requested due date for these comments is November 17, 2021. Accordingly, the South Carolina Office of Regulatory Staff ("ORS") provides the comments below.

1. Initial Filings

Not all documents filed with the Commission necessitate the opening of a Commission docket. However, there are certain filings that not only require the opening of a docket but also necessitate the creation of a procedural schedule (*i.e.* applications or petitions that propose new programs, an adjustment in rates, charges, terms and conditions). Oftentimes, in docket inducing filings, the utilities making the initial filing are in the best position to choose when that filing is made and the substance included therein. In other words, the utility has total control of when and what it files. Accordingly, ORS believes there are substantial procedural efficiencies that can be gained when that utility includes all pertinent, accurate, and necessary information and files direct testimonies commensurate with the filing of the initial documents.

a. Gaining Procedural Efficiency

In order to realize procedural efficiencies, ORS recommends the Commission require utilities to file substantive direct testimony contemporaneous with any application that proposes new programs, an adjustment in rates, charges, terms and/or conditions. Utilities are in control of when and what they file. Therefore, they have the ability and should have the burden to file their direct testimony when the application is filed. Once a utility files its application, it is aware of the various positions it will present to the Commission in the proceeding. Accordingly, the utility can file direct testimony commensurate with the filing of the application. If this approach were taken, it would provide stakeholders and interested parties additional time to review and respond to the application and direct testimony.

By statute the Commission must file a final order no later than six months after an application for an adjustment in rates is filed. The schedule in a rate case includes numerous requirements for both the Commission and parties to the proceeding, including notice, pre-filed testimony deadlines, public hearings, merit hearings and proposed order due dates. These dates are typically compressed into about four to five months in order to allow the Commission time to consider, draft and approve a final order by the six-month deadline. By requiring utilities to file substantive direct testimony contemporaneous with any application that proposes new programs, an adjustment in rates, charges, terms and conditions, the Commission enhances the procedural efficiencies of the hearing, increases review time, allows for greater communication among parties, and ultimately helps to generate an order best positioned to be just and reasonable and in the public interest. For instance, by requiring the filing of substantive direct testimony commensurate with the Application, parties are given additional time to conduct discovery and communicate with the utility. This additional time gives participating parties the ability to conduct a more meaningful and in-depth discovery process.[1] It also enables additional time for meaningful back-and-forth dialogue between the parties. Clear evidence of the benefits of additional time can be seen in Docket No. 2020-125-E. In that docket, Dominion Energy South Carolina, Incorporated ("DESC") applied for a substantial rate increase. With the assistance of the additional time allowed by the Commission and participating parties, all participating parties entered into a comprehensive settlement and the Commission approved rates that were approximately $142.4 million, or 80%, less than the rates for which DESC had originally applied.[2]

b. The Inclusion of All Pertinent, Accurate, and Necessary Information

Commissioner Caston noted that "often the substance of Direct Testimony and Exhibits may not be as robust in evidentiary support and explanation of an applicant's petition or application and that the Rebuttal Testimony may contain more substance and evidentiary support than the

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[1] The utility likely has expended significant time and resources planning for a rate case involving many variables. More meaningful discovery means more thoroughly vetted positions for Commission consideration. It is only with a sufficient allowance for discovery that Parties can present evidence to the Commission upon which the Commission will ultimately rely in its Order.
[2] *See* Order No. 2021-570.

Direct Testimony."[3] To that end, ORS recommends that a utility be required to include accurate, complete, and final versions of all supporting schedules and financial documentation when it files an application or petition for which a procedural schedule will be set. In the past, it has not been unusual for utilities to amend financial data, pro forma adjustments, and other supporting documentation after the utility files direct testimony. When this occurs, it has the potential to invalidate the data previously filed by the utility and necessitates additional review by ORS, which, due to the statutory timeline, can result in prejudice to ORS. The ORS must have sufficient time to audit, examine and investigate the rate application and the supporting documentation in order to fulfill the statutory duties assigned to ORS and present complete and accurate testimony to the Commission. Moreover, as stated earlier, the utility is in the best position to determine the nature, timing, and substance of its filings. As a result, utilities place ORS at an unreasonable disadvantage when they file an application, thereby starting the running of the statutory timeline, and render that initially submitted data void at a later date.

By requiring accurate, complete, and final data, along with the filing of substantive direct testimony by a utility commensurate with the filing of the initial documentation, the Commission promotes the public interest and may provide interested parties invaluable time for audit, examination, discovery, testimony preparation, issue resolution, and drafting of a proposed order.

2. Pre-Filing Responsive Testimonies

Commissioner Caston also discussed "the need for pre-filed written rebuttal and/or surrebuttal testimony versus reserving rebuttal and/or surrebuttal testimony to be provided live during the hearing."[4] The ORS recommends that the Commission continue the practice of allowing parties to pre-file rebuttal and surrebuttal testimony. As this Commission is aware, matters for Commission consideration are oftentimes extremely technical in nature and require a thorough analysis by subject matter experts. These analyses are often only completed after significant periods of discovery and review. Pre-filed responsive testimony, while not intended to introduce new material to the parties and Commission, oftentimes provides necessary clarity and aids in the review process.[5] Accordingly, every party benefits from the opportunity to review opposing parties' pre-filed responsive testimonies, gain insight into opposing parties' analyses, and question opposing parties through discovery. All parties would be adversely prejudiced if adversaries did not have an opportunity to hear responsive testimony until the hearing because the parties would lose the ability to meaningfully review pre-filed responsive testimony and appropriately respond. More specifically to ORS, it is necessary that ORS be provided with the opportunity to file surrebuttal testimony to ensure that the interests of the customers are represented. Accordingly, the pre-filing of responsive testimonies actually serves to promote administrative efficiency and increases the Commission's ability to review and adjudicate

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[3] Order No. 2021-736.

[4] *Id.*

[5] Utilities have on occasion raised new arguments or taken new positions in their rebuttal testimony, and even during the course of a hearing. *See* Docket No. 2017-370-E and Docket No. 2019-290-WS

complicated matters presented to it. For these reasons, the Commission should continue the practice of allowing parties to pre-file surrebuttal testimony.

In the event the Commission eliminates pre-filed rebuttal and surrebuttal, ORS recommends that utilities be required to re-file their rate applications if the utility wishes to update or change any information contained in the application. Without the above corresponding requirements, the customers and other parties are disadvantaged in the presentation of their positions to the Commission.

3. Responding to Other Parties' Direct in Responsive Testimonies

Finally, in Commission Docket Nos. 2021-143-E and 2021-144-E, a witness filing surrebuttal testimony on behalf of the Southern Alliance for Clean Energy ("SACE"), South Carolina Coastal Conservation League ("CCL"), Upstate Forever, Vote Solar, and the North Carolina Sustainable Energy Association (collectively, "the Clean Energy Intervenors") spent considerable time responding to the direct testimony of ORS witnesses. In response, ORS filed a Motion to Strike alleging the Clean Energy Intervenors' surrebuttal testimony was improper surrebuttal testimony. While ORS's objection was overruled, the Commission referenced Docket No. 2021-191-A as an appropriate forum in which to raise this issue. Accordingly, ORS once again asserts that it is procedurally improper and prejudicially unfair to allow an intervenor witness to use surrebuttal testimony to respond to the direct testimony of ORS or another intervenor witness because the witness to whom the response is directed has no meaningful opportunity to pre-file responsive testimony.

Surrebuttal is the response to the opposing party's rebuttal in a trial or other proceeding, in other words, a rebuttal to a rebuttal. Black's Law Dictionary (11th ed. 2019). In proceedings before the Commission, the applicant, as the party with the burden of proof, must produce and disclose its case, including evidence in support thereof, and after ORS and any intervening parties offer their respective evidence, the applicant then may pursue rebuttal testimony. Surrebuttal testimony ensures that ORS and other responding parties have the ability to address matters, facts, and evidence raised in the applicant's rebuttal testimony. Courts in South Carolina have long held that surrebuttal should be limited in scope to address issues raised in rebuttal. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1994) ("He upon whom lies the burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of a true reply and not such as should have been offered in the case in chief."); *see also McGaha v. Mosely*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984) ("Reply testimony should be limited to rebuttal of matters raised in defense."). It is well-established that surrebuttal responds to rebuttal.

Moreover, surrebuttal as an integral part of the administrative hearings process provides a safeguard against the element of unfair surprise. *See Daniel, McGaha, supra.* The principal of preventing unfair surprise is also reflected in jurisdictions outside of South Carolina, where courts considering the issue have equated surrebuttal with fairness and transparency, and allows for equitable treatment among the parties. *Ross v. Danter Assocs., Inc.*, 102 Ill. App. 2d 354, 367, 242

N.E.2d 330, 336 (Ill. App. Ct. 1968) ("The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff of rebuttal. In other words, fairness requires that the defendant be permitted to oppose new matters presented by plaintiff for the first time which the defendant could not have presented or opposed at the time of the presentation of his main case.") citing *City of Sandwich v. Dolan*, 141 Ill. 430, 31 N.E. 416 and *City of Rock Island v. Starkey*, 189 Ill. 515, 59 N.E. 971.

Where a party uses surrebuttal testimony to respond in opposition to the direct testimony of another party, the opposed party is unfairly surprised, prejudiced, and has no opportunity to offer pre-filed testimony in response. The improper surrebuttal testimony is not contemplated by the very definitions of surrebuttal testimony or the case law. Accordingly, ORS recommends surrebuttal testimony in response to direct testimony be prohibited by the Commission.

Conclusion

In sum, when a filing necessitates a procedural schedule, the utility making the initial filing should have the obligation to provide accurate and adequate information commensurate with the filing of their Application or Petition. The utility applicant or petitioner should be required to file substantive and complete direct testimony commensurate with the application or petition and should be prohibited from substantially modifying their application or petition once the Commission has accepted the filing. By requiring these, the Commission would provide additional time for discovery and enhance the opportunity to resolve disputes before it.

Moreover, due to the complex nature of the matters often under Commission consideration, ORS does not believe it would be wise to dispose of pre-filing responsive testimonies. The pre-filed responsive testimonies give all opposing parties opportunities to review and, if necessary, conduct analyses on opposing positions. In doing this, opposing sides are more able to present complete cases to the Commission.

Finally, ORS would respectfully request the Commission conclude that intervenor surrebuttal testimony be responsive only to rebuttal testimony. In doing so, the Commission would maintain conformity with the very definitions of the terms and prevent an inappropriate prejudicial effect upon ORS or an intervenor party.

Sincerely,

Andrew M. Bateman

cc: All Parties of Record (via e-mail)
C. Jo Anne Wessinger Hill, Esquire (via e-mail)
David Butler, Esquire (via e-mail)